Nos. 17-1717 and 18-18

In The
Supreme Court of the United States

THE AMERICAN LEGION, *et al.*,
Petitioners,

v.

AMERICAN HUMANIST ASSOCIATION, *et al.*,
Respondents.

MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION,
Petitioner,

v.

AMERICAN HUMANIST ASSOCIATION, *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF *AMICUS CURIAE* VARIOUS PROFESSORS IN SUPPORT OF THE PETITIONERS

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QUESTION PRESENTED

Whether the Establishment Clause prohibits a 93-year-old cross dedicated as a memorial to fallen veterans of World War I, where that monument incorporates religious symbolism acceptable to the Framers of the First Amendment, and is in keeping with a longstanding tradition of similar public cross monuments that has withstood the critical scrutiny of time and political change.

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STATEMENT OF IDENTITY AND INTEREST OF *AMICI CURIAE*[1]

Amici are a group of professors of history, politics and law who have taught courses and published scholarship on how the religious values of the Founders informed the Religion Clauses in our Bill of Rights. The research, knowledge, and experience of *Amici* demonstrate that our Founders did not view verbal or physical acknowledgement of religion as matters to be stifled, as has occurred in some cases that have applied *Lemon*. Instead, based on *amici*'s study of history, memorials like the Peace Cross that incorporate religious symbolism are compatible with the Founders' view of the Free Exercise and Establishment Clauses.

The brief is joined by the following experts:

- Hadley Arkes is the Edward N. Ney Professor in American Institutions, Emeritus, at Amherst College.
- Thomas Conner is a Professor of History at Hillsdale College.
- Kevin Gutzman is a Professor of History at Western Connecticut State University

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[1] Pursuant to Rule 37.6, *Amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *Amici* and their counsel made a monetary contribution to its preparation or submission. Petitioners' and Respondents' blanket letter of consent to the filing of amicus briefs has been filed with the Clerk's office.

- Mark David Hall is the Herbert Hoover Distinguished Professor of Politics at George Fox University.

- William H. Hurd is a former Solicitor General of Virginia and an Adjunct Professor at the Antonin Scalia Law School, where he teaches the Religion Clauses.[2]

- Glenn Moots is a Professor and Chair of Political Science and Philosophy at Northwood University.

SUMMARY OF ARGUMENT

The Establishment Clause must be understood in light of the Founders' views. In seeking to understand those views, this Court has looked for guidance in James Madison's "Memorial and Remonstrance Against Religious Assessments," and in Thomas Jefferson's Virginia Statute for Religious Freedom. *See, e.g., Everson v. Bd. of Educ.*, 330 U.S. 1, 13 (1947). Those two founding documents are profoundly theological in nature. The logical consequence of looking to them for guidance is to reject the idea that all government symbolism that incorporates religious elements is prohibited.

Moreover, it is questionable whether those two documents can give complete guidance, especially because the Establishment Clause was meant, in part, to shield state action from federal interference. Understanding the foundations of the Establishment

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[2] A partner at Troutman Sanders LLP, Mr. Hurd also contributed substantially to the writing of this *amicus* brief.

Clause in federalism further undermines the decision by the court of appeals.

In seeking to understand the Establishment Clause, longstanding practices deserve deference. "[T]he Establishment Clause must be interpreted by reference to historical practices and understandings." *Town of Greece v. Galloway*, 572 U.S. 565, 576 (2014) (internal quotation marks and citations omitted). The use of imagery that incorporates religious elements—including crosses on public lands—to commemorate important events is such a longstanding practice.

Removing the Peace Cross—or sawing off its arms as Respondents have suggested—would lead to a flurry of cases against similar monuments across the country. Such twenty-first century iconoclasm would spawn the sort of divisiveness that the Establishment Clause was intended to avoid—a point Justice Breyer previously recognized with respect to monuments to the Ten Commandments. *See Van Orden v. Perry*, 545 U.S. 677, 704 (2005) (Breyer, J., concurring in judgment).

ARGUMENT

The Legal Roots of the Establishment Clause

There are those who claim that the Establishment Clause completely forbids any government expression of religious belief, but whether this is so—or whether it is an exaggeration—can best be determined by looking at the origin of the Clause and how it was understood by the generation that enacted it. In looking at the origin, members of

this Court often have considered the Virginia assessment controversy of 1784 to 1786.[3] This historic episode involved three major documents: (i) Patrick Henry's Bill Establishing a Provision for Teachers of the Christian Religion, legislation that would have taxed all Virginians (with a few exceptions) to raise money for the support of the Christian denomination of their individual choosing; (ii) James Madison's "Memorial and Remonstrance Against Religious Assessments," a broadly-endorsed opposition to Henry's bill; and (iii) the Virginia Statute for Religious Freedom, a bill authored by Thomas Jefferson and adopted by the 1786 General Assembly in lieu of the measure proposed by Henry.

This Court has treated Madison's "Memorial and Remonstrance" as "an important document in the history of the Establishment Clause." *Borough of Duryea v. Guarnieri*, 564 U.S. 379, 396 (2011). There are fifteen numbered paragraphs to the Memorial and Remonstrance, each with its own argument against Henry's bill. Some are pragmatic in nature, others are philosophical, and still others are Christian appeals, arguing that compulsory support for churches would undermine the very teachings the bill is intended to promote. The very first argument is an unequivocal recognition of God:

> [W]e hold it for a fundamental and undeniable truth, "that Religion or ***the***

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[3] *See, e.g., Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 140 (2011); *City of Boerne v. Flores*, 521 U.S. 507, 560-64 (1997) (O'Connor, J. and Breyer, J., dissenting); *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 853-57, 859 (1995) (Thomas, J., concurring); *id.* at 868 (Souter, J., Stevens, J., Ginsberg, J. and Breyer, J., dissenting).

> ***duty which we owe to our Creator*** and the manner of discharging it, can be directed only by reason and conviction, not by force or violence." [quoting 1776 Virginia Declaration of Rights]. The Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate.

See The Sacred Rights of Conscience: Selected Readings on Religious Liberty and Church-State Relations in the American Founding, 309 (Daniel L. Dreisbach & Mark David Hall, eds., 2009) (hereinafter, "Sacred Rights") (emphasis added).[4]

Clearly, the Memorial and Remonstrance recognizes the existence of the Creator as the predicate for the "fundamental and undeniable truth" that the document espouses. Thus, to the extent that the document helps illuminate the meaning of the Establishment Clause, it makes no sense to say that the Clause requires all religion or religious expressions to be banished from the public square.

Even more important than the Memorial and Remonstrance is the Virginia Statute, which

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[4] Madison went on to argue that "ecclesiastical establishments, instead of maintaining the purity and efficacy of religion, have had a contrary operation" and that "the bill is adverse to the diffusion of the light of Christianity." *Id.* at 311, 312. Freeing Christianity from state control, he explained, will lead it to flourish, which will in turn "establish more firmly the liberties, the prosperity, and the happiness of the Commonwealth." *Id.* at 313.

Madison's document helped enact and which this Court has treated as a valuable guide to understanding the federal Religion Clauses:

> This Court has previously recognized that the provisions of the First Amendment, in the drafting and adoption of which Madison and Jefferson played such leading roles, had the ***same objective*** and were intended to provide the ***same protection*** against governmental intrusion on religious liberty as the Virginia statute.

Everson, 330 U.S. at 13 (citing cases) (emphasis added).[5] If this passage of *Everson* is faithfully

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[5] With respect to the origin of the Establishment Clause, some scholars have noted that the influence of the Memorial and Remonstrance and the Virginia Statute was not so great as *Everson* suggests. *See, e.g.*, Mark David Hall, *Madison's Memorial and Remonstrance, Jefferson's Statute for Religious Liberty, and the Creation of the First Amendment*, 3 American Political Thought 1, 32-63 (2014). Consideration of similar debates in the other States reveals that virtually no civic leaders thought that governments should refrain from protecting, promoting, and encouraging religion. *See generally The Founders on God and Government* (Daniel L. Dreisbach, Mark D. Hall, & Jeffry H. Morrison, eds., 2004); *The Forgotten Founders on Religion and Public Life* (Daniel L. Dreisbach, Mark David Hall, & Jeffry H. Morrison, eds., 2009); *Faith and the Founders of the American Republic* (Daniel L. Dreisbach & Mark David Hall, eds., 2014).

applied, one cannot understand the federal Religion Clauses without first understanding the Virginia Statute. Like the Memorial and Remonstrance, this text is profoundly theological. Its preamble begins:

> Whereas, ***Almighty God*** hath created the mind free;
>
> That all attempts to influence it by temporal punishments or burthens, or by civil incapacitations tend only to beget habits of hypocrisy and meanness, and therefore are a ***departure from the plan of the holy author of our religion***, who being Lord, both of body and mind yet chose not to propagate it by coercions on either, as was in his Almighty power to do. . . .

Va. Code § 57.-1 (reciting *Act for Religious Freedom* (1786)) (emphasis added). In other words, first and foremost, the Virginia Statute mandated religious liberty because God wished there to be such liberty.

Indeed, a major purpose of the Establishment Clause was to protect state establishments against any federal interference. *See, e.g., Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 45 (2004) (Thomas, J., concurring in judgment) (noting that "the Establishment Clause is a federalism provision, which, for this reason, resists incorporation."). Such a fuller understanding of the origins of the Establishment Clause makes even more untenable any claim that the Peace Cross in Maryland is somehow unconstitutional.

It would be illogical, indeed, if civil rights expressly *rooted* in such governmental recognition of God somehow *precluded* all governmental recognition of God. The Virginia Statute cannot be so twisted, nor can the federal Religion Clauses be so twisted, given that, under this Court's jurisprudence, they share the same purposes and objectives.

The Founders' Expressions of Faith

From the Republic's inception its Founders embraced governmental expressions of religious belief, unabashedly intertwining the secular and religious. Indeed, the Declaration of Independence, the document rightfully said to have started it all, invokes "the laws of nature and of nature's God," then moves to these well-known words: "We hold these truths to be self-evident: that all men are created equal; that they are endowed by their Creator with certain unalienable rights; that among these are life, liberty and the pursuit of happiness." The drafters closed their Declaration by "appealing to the Supreme Judge of the world" and "rel[ying] on the protection of divine Providence."

Nor did the Founders eschew their faith when they set about the task of nation-building. To be sure, the Constitution may lack much of the lofty religious imagery of the Declaration, but its drafters continued to express their faith as the fledgling government took its first breath.

Particularly relevant for interpreting the First Amendment are the actions of the First Congress, the body that drafted and proposed this constitutional provision. For instance, on the day after the House

approved the final wording of the Bill of Rights, Congressman Elias Boudinot of New Jersey, later president of the American Bible Society, proposed that Congress ask the President to recommend a day of public thanksgiving and prayer. The House approved the motion, the Senate agreed with the House, and Congress passed the following Resolution:

> Resolved, that a joint committee of both Houses be directed to wait upon the President of the United States, to request that he would recommend to the people of the United States a day of public thanksgiving and prayer, to be observed by acknowledging, with grateful hearts, the many signal favors of Almighty God, especially by affording them an opportunity peaceably to establish a Constitution of government for their safety and happiness.

1 Annals of Cong. 90, 913-14 (1789) (Joseph Gales, ed., 1834). It simply never occurred to this first Congress that its call for a government-sponsored day of "thanksgiving and prayer" would conflict with the language it had just approved prohibiting "an establishment of religion."

George Washington apparently saw no conflict, either, and readily accepted the invitation. His October 3, 1789 Thanksgiving Day Presidential Proclamation echoed Congress' overtly religious tone:

> Whereas it is the duty of all Nations to acknowledge the providence of almighty God, to obey his will, to be grateful for

> his benefits, and humbly to implore his protection and favor—and Whereas both Houses of Congress have by their joint Committee requested me "to recommend to the People of the United States a day of public thanksgiving and prayer to be observed by acknowledging with grateful hearts the many signal favors of Almighty God, especially by affording them an opportunity peaceably to establish a form of government for their safety and happiness." Now therefore I do recommend and assign Thursday the 26th day of November next to be devoted by the People of these States to the service of that great and glorious Being, who is the beneficent Author of all the good that was, that is, or that will be—That we may then all unite in rendering unto him our sincere and humble thanks.

See Thanksgiving Proclamation, 3 October 1789, Founders Online, http://founders.archives.gov/documents/Washington/05-04-02-0091 (last visited Dec. 24, 2018).

Washington's successors did likewise. In his March 23, 1798 Proclamation Proclaiming a Fast-Day, John Adams declared:

> As the safety and prosperity of nations ultimately and essentially depend on the protection and the blessing of Almighty God, and the national acknowledgment

> of this truth is not only an indispensable duty which the people owe to Him, but a duty whose natural influence is favorable to the promotion of that morality and piety without which social happiness can not exist nor the blessings of a free government be enjoyed; and as this duty, at all times incumbent, is so especially in seasons of difficulty or of danger, when existing or threatening calamities, the just judgments of God against prevalent iniquity, are a loud call to repentance and reformation . . . it has appeared to me that the duty of imploring the mercy and benediction of Heaven on our country demands at this time a special attention from its inhabitants. I have therefore thought fit to recommend, and I do hereby recommend, that Wednesday, the 9th day of May next, be observed throughout the United States as a day of solemn humiliation, fasting, and prayer.

See Proclamation Proclaiming a Fast-Day, 23 March 1798, Founders Online, http://founders.archives.gov/documents/Adams/99-02-02-2386 (last visited Dec. 24, 2018).

Unlike Washington and Adams, Jefferson declined to issue calls for prayer when he was President of the United States. In an 1808 letter to Samuel Miller, he indicated that both the First and the Tenth Amendments prevented him from doing so. Such calls for prayer, he suggested, should be issued

by state governments, if they are to be issued at all. *See* Sacred Rights, 531.

Yet in more than one speech he invited his audiences to pray. For instance, Jefferson closed his second inaugural address by noting that he would need "the favor of that Being in whose hands we are, who led our forefathers, as Israel of old" and asked his listeners to "join with me in supplications, that he [God] will so enlighten the minds of your servants, guide their councils, and prosper their measures, that whatsoever they do, shall result in your good, and shall secure to you the peace, friendship, and approbation of all nations." *See* Sacred Rights, 530.

Late in life, James Madison suggested that presidents should not issue calls for prayer, *see id.* at 589-93 (citing Madison's "Detached Memorandum"), but as President, he issued four of them. One acknowledged that "[n]o people ought to feel greater obligations to celebrate the goodness of the Great Disposer of Events of the Destiny of Nations than the people of the United States. His kind providence originally conducted them to one of the best portions of the dwelling place allotted for the great family of the human race." *See Presidential Proclamation, 4 March 1815*, Founders Online, http://founders.archives.gov/documents/Madison/99-01-02-4146 (last visited Dec. 24, 2018). President Madison then concluded with an earnest call to national prayer:

> It is for blessings such as these, and more especially for the restoration of the blessing of peace, that I now recommend that the second Thursday in April next

> be set apart as a day on which the people of every religious denomination may in their solemn assembles unite their hearts and their voices in a freewill offering to their Heavenly Benefactor of their homage of thanksgiving and of their songs of praise.

Ibid.

Further examples of this interplay between government and religious expression in this Nation's early years are legion. Three days before approving the First Amendment's language, both Houses provided for the selection and payment of chaplains. 2 Annals of Cong. 2180; 1 Stat. 71. The same drafters of the First Amendment were also responsible for reenacting the Northwest Ordinance declaring "[r]eligion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged." Northwest Ordinance of 1787, art. III, reenacted 1789.

Those beliefs and practices remain connected with those of today. When the United States Supreme Court hears oral arguments in the present case, the day's session will begin with the prayer "God save the United States and this Honorable Court." The first recorded instance of the Supreme Court opening with this prayer was in 1827, under Chief Justice John Marshall, but federal circuit courts were doing so openly as early as the 1790s. For instance, according to a New Hampshire paper:

> After the Jury were empaneled, the Judge delivered a most elegant and appropriate Charge . . . *Religion and Morality* were pleasingly inculcated and enforced, as being necessary to good government, good order and good laws, for "when the righteous are in authority, the people rejoice." [Proverbs 29: 2].
>
> After the Charge was delivered, the Rev. Mr. [Timothy] Alden addressed the Throne of Grace, in an excellent, well-adapted prayer.

United States Oracle (1800), *reprinted in The Documentary History of the Supreme Court of the United States, 1789-1800*, (Maeva Marcus, ed., 1990).

Such "actions of our First President and Congress and the Marshall Court were not idiosyncratic; they reflected the beliefs of the period." *McCreary Cty. v. ACLU*, 545 U.S. 844, 886 (2005) (Scalia, J., dissenting). "All of these events strongly suggest that our national culture allows public recognition of our Nation's religious history and character." *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 30 (2004) (Rehnquist, C.J., concurring in judgment).

In short, these and countless other examples form the contextual tapestry underlying the Establishment Clause at the heart of this case. They should not be ignored. To the contrary, this Court's contemporary Establishment Clause jurisprudence teaches precisely the opposite. "[T]he Establishment Clause must be interpreted 'by reference to historical

practices and understandings.'" *Greece*, 572 U.S. at 576 (quoting *Cty. of Allegheny v. Am. Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U.S. 573, 670 (1989) (Kennedy, J., concurring in judgment in part and dissenting in part)).

In *Greece*, this Court held that a sectarian Christian prayer at the beginning of a city council's meetings did not violate the Establishment Clause and, in so doing, did not once mention the separationist formulation previously found in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). Instead, this Court relied on its decision in *Marsh v. Chambers*, 463 U.S. 783 (1983), noting that "*Marsh* stands for the proposition that it is not necessary to define the precise boundary of the Establishment Clause where history shows that the specific practice is permitted. Any test the Court adopts must acknowledge a practice that was accepted by the Framers and has withstood the critical scrutiny of time and political change." *See Greece*, 572 U.S. at 577; *see also Allegheny*, 492 U.S. at 670 (Kennedy, J. concurring in judgment in part and dissenting in part) (stating that any "test for implementing the protections of the Establishment Clause that, if applied with consistency, would invalidate longstanding traditions cannot be a proper reading of the clause").

Americans Have Long Commemorated Major Events with Religious Symbols and Imagery.

Here, there can be no question that the use of public crosses as memorials, whether secular, religious, or both, is just such a "longstanding tradition" in this Nation. Examples of well-known

monuments incorporating the cross include the following:

- In Richmond, Virginia, a large Latin cross set near the falls of the James River. Known as the Christopher Newport Cross, it commemorates the 1607 expedition of Captain Newport, who sailed upriver as far as the falls, and bears the inscription "Dei Gratia Virginia Condita," or "Virginia was founded by the Grace of God."

- In Mobile, Alabama, a large stone cross, known as the Bienville Cross, sits in the heart of downtown in a public square. As shown by its inscription, it is a monument to Jean Baptiste LeMoyne, Sieur de Bienville (1680-1768), founder of the city, whose recited accomplishments include bringing "the Prosperity of true Civilization and the Happiness of real Christianity."

- The Father Millet Cross, which currently stands in Fort Niagara State Park in upstate New York, was originally erected in 1688 by a Jesuit priest, Father Pierre Millet. In 1925, President Calvin Coolidge set aside a 320-square-foot section of Fort Niagara Military Reservation "for the erection of another cross commemorative of the cross erected and blessed by Father Millet."

- In Santa Fe, New Mexico, there is the Cross of the Martyrs, a large steel cross erected to commemorate the 21 Franciscan Friars who perished in the 1680 Indian uprising known as the Pueblo Revolt.[6]

- The Cross Mountain Cross, in Fredericksburg, Texas, stands where the first settlers of what is now Fredericksburg first discovered a timber cross on a hilltop in 1847. A cross has remained there since; the original replaced with a permanent lighted version in 1946, which today resides in the city-maintained Cross Mountain Park.

- Since 1858, a cross has stood atop the Chapel of the Centurion at Fort Monroe, in Hampton, Virginia. Named for Cornelius, the Roman centurion converted to Christianity by St. Peter, the Chapel served as the United States Army's oldest wooden structure in continuous use for religious services until it was decommissioned in 2011.

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[6] The Pueblo Revolt is almost unknown among those Americans whose understanding of our history is limited to the westward movement from the eastern seaboard, but it is familiar to many Native Americans and to New Mexicans, whose original European predecessors came from Spanish possessions in what is now the country of Mexico.

- The Irish Brigade Monument, a 19-foot Celtic cross, was placed in Gettysburg National Military Park in 1888 to honor soldiers from three New York regiments who fought and died at Gettysburg.

- The Jeannette Monument at the United States Naval Academy, a Latin cross dedicated to sailors who died exploring the Arctic in 1881, was erected in 1890, and is the largest monument in the Naval Academy Cemetery.

- A six-foot marble cross known as the Horse Fountain Cross was placed in Lancaster, Pennsylvania in 1898 and is maintained by the City of Lancaster. It bears the inscription "Ho! Everyone That Thirsteth" and sits atop a granite base with a small fluted basin designed to allow horses to drink from it.

- The Father Serra Cross is an 11-foot granite Celtic cross donated to the City of Monterey in 1905 and installed on public land in 1908. The cross features a portrait of Father Junipero Serra and an image of his Carmel Mission.

- A large Celtic cross known as the Wayside Cross sits in New Canaan, Connecticut's historic green. Erected

in 1923 as a war memorial, it bears the inscription: "Dedicated to the glory of Almighty God in memory of the New Canaan men and women who, by their unselfish patriotism, have advanced the American ideals of liberty and the brotherhood of man."

- Then, in New York City, there stands, of course, the Ground Zero Cross. Composed of steel beams approximating the shape of a Latin cross and found amid the wreckage of the World Trade Center, the cross is now erected at the National September 11 Memorial & Museum.

Amici respectfully submit that these historical examples, and this Court's more recent Establishment Clause jurisprudence as embodied by Justice Kennedy's opinion in *Greece*, should guide the Court's analysis here. Such history must necessarily play a crucial role in any Establishment Clause analysis, and, as a plurality of this Court noted in *Van Orden v. Perry*, 545 U.S. 677, 686 (2005), "[w]hatever may be the fate of the *Lemon* test in the larger scheme of Establishment Clause jurisprudence," it is "not useful in dealing with the sort of passive monument that Texas ha[d] erected on its Capitol grounds" in that case. The *Lemon* test is similarly inadequate here.

The New Iconoclasts

Throughout history, there have been rampages of iconoclasm, where militants of various beliefs—or disbelief—have sought to destroy religious images they found offensive. In seventeenth-century England, it was Puritan extremists who destroyed images of saints and stained-glass windows found in Anglican churches. In eighteenth-century France, the Revolution saw the destruction of many religious symbols by those who hated them as vestiges of the Old Regime. In twentieth-century Russia, it was the Bolsheviks. In the twenty-first century, the Middle East has seen the destruction of historic religious structures by members of ISIS and its affiliates.

In twenty-first century America, there is a new wave of iconoclasts, intent on using the courts to purge the public square of any religious symbolism, even where conjoined with a predominantly secular message. One such attack was launched against displays of the Ten Commandments in *Van Orden, supra*. There, the Court held that the display of a monument to the Ten Commandments on the grounds of the Texas state house did not violate the Establishment Clause. Critical to the result was the opinion of Justice Breyer, who recognized that judicial removal of the Ten Commandments in that case could have far-reaching and divisive consequences. He wrote that ordering such removal,

> based primarily on the religious nature of the tablets' text would, I fear, lead the law to exhibit a hostility toward religion that has no place in our Establishment Clause traditions. Such a holding might

> well encourage disputes concerning the removal of longstanding depictions of the Ten Commandments from public buildings across the Nation. And it could thereby create the very kind of religiously based divisiveness that the Establishment Clause seeks to avoid.

Van Orden, 545 U.S. at 704 (Breyer, J., concurring in judgment). What Justice Breyer foresaw in *Van Orden* about displays of the Ten Commandments can be foreseen in the case at bar about displays of crosses. As noted above, there are many longstanding displays of crosses in public places across the nation. Indeed, as Petitioners point out, the erection of crosses as memorials is a commonplace practice, dating back centuries. Br. of Pet. at 56.

Such public crosses across the country are not purely religious. They carry secular messages as well. Nor should this blending of the secular and the religious be viewed as either a sham or sacrilege. On the contrary, it is to be expected that, for "a religious people whose institutions presuppose a Supreme Being," *Zorach v. Clauson*, 343 U.S. 306, 313 (1952), the commemoration of important secular events should be interwoven with symbols of faith. And, in a country where the great majority of people have historically—and to this day—identified themselves as Christian, the need for a symbol of faith is often met by the cross. Consider, for example, the Ground Zero Cross. If the workers had found a remnant of steel beams in the shape of a circle or square, it would have meant nothing. But, finding a *cross*—a symbol of faith for millions—spoke of hope and renewal

overcoming the devastation of that horrible day in our nation's history.

The Peace Cross likewise combines religious and secular elements. The American Legion emblem, located prominently at the intersection of the vertical and horizontal beams, is a symbol not found in the crucifixes of any Christian denomination. Similarly, the words "VALOR," "ENDURANCE," "COURAGE," and "DEVOTION" chiseled into the base call to mind important human virtues, but not ones for which Christianity makes any special claim. Nor is the American flag flying nearby the symbol of any particular faith. Given these features, the monument sends a message that *this cross* is meant to commemorate an episode in the history of our nation's wars. Thus, even if the cross were to be evaluated from the perspective of passers-by, this mixture of secular and religious symbolism would create no constitutional violation.

Moreover, "proper application of the endorsement test requires that the reasonable observer be deemed *more informed* than the casual passerby." *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 779 (1995) (emphasis added) (O'Connor, J., joined by Souter, J. and Breyer, J., concurring in part and concurring in judgment). Instead, the "reasonable observer" "must be deemed aware of the history and context of the community and forum in which the religious display appears." *Id.* at 780. Here, being aware of the history and context means knowing a number of things, including the following:

- The monument was erected in 1925 to honor the 49 men from Prince George's County who died in the Great War (now known as World War I), and whose names are set forth in plaques on its pedestal.

- The plaques on the monument include a quotation from President Woodrow Wilson. It is idealistic but not religious: "The right is more precious than peace. We shall fight for the things we have always carried nearest our hearts. To such a task we dedicate our lives."

- The name of the monument—"the Peace Cross"—is reminiscent of that generation's hope that the "War to End All Wars" would achieve its goal.

- More so than with other wars, the generation that fought World War I widely viewed the cross as a metaphor for the sacrifices of our war dead. *See, e.g.*, John McCrae, *In Flanders Fields*, ("In Flanders fields the poppies blow, / ***Between the crosses, row on row***, / That mark our place . . . .") (emphasis added); *Am. Humanist Ass'n v. Md.-Nat'l Capital Park & Planning Comm'n*, 891 F.3d 117, 124 (4th Cir. 2018) (Niemeyer, J., dissenting from the denial of rehearing *en banc*) ("The monument's use of the cross shape

> mirrors the custom in Europe during World War I . . . .").

Given these facts, a reasonable observer would not view the Peace Cross as predominantly religious (even without the monuments to other veterans placed nearby). While the idealism of those who erected the monument may have been interwoven with their faith, their use of a cross does not run afoul of the Establishment Clause, as understood by the Founders. And, while approval of the Ten Commandments monument in *Van Orden* does not mark the outer boundaries of what that original understanding would permit, it is not necessary to go beyond the precedent of *Van Orden* to approve the monument at issue here.

Indeed, if this Court were to order the removal of the Peace Cross, it would not only be wrong, it would encourage a spate of iconoclastic lawsuits aimed at toppling other crosses across the country, or, as respondents suggested here, sawing off the arms of the crosses so as to leave some sort of "slabs" or "obelisks." *Am. Humanist Ass'n v. Md.-Nat'l Capital Park & Planning Comm'n*, 874 F.3d 195, 202 n.7. (4th Cir. 2017). Either way, the result would be the "religiously based divisiveness" that Justice Breyer so clearly foresaw—and sought to avoid—in *Van Orden*. This Court should not unleash those furies. The Peace Cross should be allowed to stand.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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